REFERENCES REQUIRED BY RULES OF THIS COURT.

Opinion below. ***National Labor Relations Board vs. J. H. Allison & Co.,*** 165 Fed. (2d) 766 (R. 127-138).

Jurisdictional Authority. Judicial Code, Sec. 240 (a), as amended by Act of February 13, 1925.

Date of Judgment. January 26, 1948 (R. 127). Time for filing petition for certiorari extended by Reed, *J.*, until June 5, 1948.

Nature of the case, Rulings, etc. During mid-term of the union contract providing only for minimum wages, but no maximum, Allison & Company granted non-negotiated merit wage increases to employees whom they felt to be deserving. This was in line with a policy of many years standing; and no objection had ever been made to this by the union. On this occasion the union requested a list of the names of those to whom merit increases had been given, and the company declined to give this list. The union then filed a charge, accusing the company of refusing to bargain under the terms of the National Labor Relations Act. A complaint was issued. After the issuance of the complaint, and before the hearing, the union and the company negotiated a new contract. In negotiating the new contract, the union requested the company to include a clause giving the union the right to bargain as to merit wage increases. When the company declined to accede to this request, which was made only once, the union withdrew the request, and a new contract was made that was similar to the old one.

The trial examiner held that the company was guilty in (a) refusing to furnish the list when it was requested, and (b) refusing to include the requested clause in the new contract that was negotiated. The National Labor Relations Board stated it was not necessary to determine whether the refusal to furnish the list in the middle of the contract

year constituted a violation of the Act, but ruled that the company did violate the law in failing "during the formulation of the 1946 contract to negotiate concerning merit wage increases * * * and * * * continuing refusal to furnish to the union information concerning merit wage increases which had been granted * * *."

The C. C. A. (6th Circuit) *held* that the granting of merit increases *per se* constituted a violation of the National Labor Relations Act and that the company violated the Act in (a) refusing to give the union a list at the time it was requested, and (b) refusing to bargain as to merit wage increases in the formulation of the 1946 contract.

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In the

Supreme Court of the United States

OCTOBER TERM 1947.

No. .....

J. H. ALLISON & COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI To the United States Circuit Court of Appeals For the Sixth Circuit.

To The Honorable, The Chief Justice and The Associate Justices of The Supreme Court of The United States:

Petitioner prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Sixth Circuit entered on January 26, 1948, in the case of *National Labor Relations Board vs. J. H. Allison & Company*, 165 Fed. (2d) 766, granting an order of enforcement to the National Labor Relations Board. Orders granting forty days additional time for filing this petition have heretofore been entered by this Court, and this application for a writ is therefore timely.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals appears in the record beginning at page 127, and the opinion of the National Labor Relations Board appears in the record beginning at page 33.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

This case presents important questions of procedural law as well as of substantive law. The basic questions presented by the case are as follows:

(1) Can the Circuit Court of Appeals grant an enforcement order to the National Labor Relations Board on grounds other than those cited by the National Labor Relations Board in its findings?

(2) Under the National Labor Relations Act, can an employer be found guilty of an unfair labor practice on the basis of facts which occurred after the filing of the charge and the issuance of the complaint, but before the hearing of the case?

(3) Is an employer guilty of refusal to bargain with a union when, in the negotiation of a contract, the union makes a demand to which the employer declines to assent, and the union then withdraws the demand and proceeds to execute a contract?

(4) Is it a violation of the National Labor Relations Act for an employer to grant *ex parte* merit wage increases above the contractual minimum to employees, where such increases do not effect any change in the existing contractual wage agreement, and where there is no negotiating or bargaining as to such increases?

SUMMARY STATEMENT.

On December 10, 1945, the National Labor Relations Board on the basis of a charge theretofore filed by a union of petitioner company's employees issued a complaint against the petitioner company asserting that "on May 2, 1945, and at all times thereafter, the company has refused

to bargain collectively with the union with respect to merit increases in rates of pay and wages." (R. 13)

The company denied this complaint in its answer and a hearing was held before a trial examiner of the Board on January 21, 1946. (Meanwhile, in the early part of January, 1946—after the complaint had issued, and before the hearing was held—a new contract between the company and the union of its employees was negotiated, this contract being referred to throughout as the 1946 contract.)

The trial examiner filed an intermediate report in which he found that on May 2, 1945, and at all times thereafter, the company had refused to bargain with the union as charged. (R. 24)

The basic facts established in the record are as follows:

The petitioner company has had contractual relations with the union involved since 1941. The 1945 contract—a one-year contract, dated January 1945—contained a union shop provision, requiring all employees in the bargaining unit to be members of the union.

In negotiating the wage scale in that contract, the union merely bargained for a *minimum wage, no maximum wage being established by such negotiations, or set out in the contract.* This same procedure characterizes all contracts had before—and since—between the company and the union.

For a period of many years—(for more than sixteen years, according to the union president)—the company had been accustomed to giving employees what were known as "merit wage increases," on an *ex parte* basis. Whenever the company felt that a certain employee was doing a particularly good job, the company would, *without notice to the employee or the union,* and without discussion with anyone, grant the particular employee a wage increase. The first that the employee knew about getting the increase was when he received his pay check. There was no element of negotiating or bargaining in connection with such an increase, although any employee could get the union com-

mittee and come in and undertake to negotiate an increase for himself. That, however, would constitute a negotiated increase.

In the summer of 1944 the union undertook to secure a general wage increase through the medium of the War Labor Board, which at that time had charge of wage stabilization. The hearing dragged on for many months, and was finally terminated in the spring of 1945, when the War Labor Board refused to grant the increase asked by the union. Meanwhile, during the pendency of this hearing, the company had given no merit increases at all—preferring to await the decision of the War Labor Board. After the War Labor Board made its ruling, the company proceeded to grant a number of merit increases which it would have granted during the preceding several months, but for the pendency of the case. These merit increases were granted several months after the negotiation of the 1945 contract, at a time when no contract was in negotiation, and at a time when there were no negotiations going on as to wage increases (the recent negotiation having been terminated by the order of the War Labor Board, and no notice having been given as to the institution of *new* negotiations).

The union then came to the company and demanded that the company furnish it with a list of those employees who had been given merit increases, the list to show the amount of increase in each instance.

This the company declined to do.

On the basis of these facts, the charge of refusal to bargain was filed, and the complaint subsequently issued.

The only thing sought by the union was the furnishing of the list of those employees who had been granted merit wage increases. It is most important to bear this in mind. There was no demand, request, or any other attempt on the part of the union to get the company to *bargain* as to these merit wage increases. *There was merely a request that the list be furnished.*

After the complaint issued and prior to the hearing before the trial examiner, the company and the union met to negotiate the 1946 contract. In the course of these negotiations the union requested of the company that a clause be included in the contract that would give the union the right to bargain with the company on merit increases. The company demurred to this proposal, and the union thereupon abandoned it and went on to execute the 1946 contract which contained no provisions for bargaining as to merit increases. *There was no request during the formulation of this contract for the list hereinbefore mentioned, and no effort to bargain as to merit increases, save the single request for the inclusion of the clause mentioned.*

The foregoing facts are undisputed.

THE FINDING OF THE TRIAL EXAMINER.

On the basis of these facts, the trial examiner made a finding to the effect that the company had, by (1) refusing to furnish the list in May 1945, and by (2) refusing to include a clause making merit increases the subject of bargaining in the 1946 contract, refused to bargain collectively with the union.* It should be borne in mind that he based his ruling on both grounds—Ground One and Ground Two—and the facts of Ground Two occurred in the early part of January, 1946, *after the complaint had issued, but before the hearing.*

THE FINDING OF THE NATIONAL LABOR RELATIONS BOARD.

The National Labor Relations Board itself, on August 26, 1946, duly stated its findings of fact and conclusions of law. This was done in a split decision. Board members Houston and Herzog constituted the majority, and Gerard Reilly constituted the dissenting minority. The majority opinion of the Board held that it was

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* We will refer to these two bases as Grounds One and Two, respectively.

> "unnecessary to determine whether the respondent was under an obligation to bargain concerning merit increases during the term of the 1945 contract which the union had entered into without provision therein for merit increases under the wage structure, although the practice of granting merit increases upon a unilateral basis had existed for a number of years." (R. 34)

Thus the Board pretermitted Ground One. The majority opinion based its finding of a refusal to bargain upon the petitioner company's

> "failure during the formulation of the 1946 contract to negotiate concerning merit wage increases, a proper subject of collective bargaining, and upon the respondent's continuing refusal to furnish to the Union information concerning merit wage increases which had been granted, information necessary to the Union in order for it adequately to represent the employees on the subject of merit increases." (R. 35)

In other words, Ground Two was definitely the basis of the Board's ruling, and Ground One was simply mentioned, but not discussed nor passed upon.

The Board ruled that the company was guilty of a refusal to bargain in the formulation of the 1946 contract. They state two particulars in which there was such a refusal. One particular (for which there is basis in the Record) is the refusal to include the clause which the union requested. The other particular (for which there is no basis in the Record) is that the company declined to furnish information as to merit wage increases.*

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* There is not one scintilla of evidence in the Record that during the formulation of the 1946 contract the union requested "information concerning merit increases." It does not appear that the list which had been requested back in May, 1945, was then requested. Nor did the union seek at that time to bargain as to merit wage increases. The only mention made of merit increases was when the union proposed that a clause be included in the contract, which would give the union the right to bargain as to merit wage increases.

Board member Reilly held that in so far as what took place in May, 1945 was concerned (that is, Ground One), the parties were not then negotiating for a contract and it was not incumbent upon the respondent to disclose information concerning merit wage increases at that time. (This finding is not contradicted by the majority opinion, *supra.*) The dissenting opinion went on to say that since the contract that was then in force contained a minimum wage scale, but was silent as to maximum wages, the Act did not require an employer to furnish information concerning certain merit wage increases which it had granted.

In so far as concerned the company's refusal to bargain by refusing to include the requested clause in the 1946 contract, Board member Reilly pointedly asserted that

> "There is no obligation under Section 8(5) for an employer to agree to anything. Consequently, it cannot be said that an employer failed in his duty under the Act when he 'traded off' a demand on one issue for a substantial concession on another." (R. 39)

On the basis of the majority decision and the subsequent order, the Board filed proceedings with the Sixth Circuit Court of Appeals to obtain an order of enforcement.

THE FINDING OF THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals heard argument on the case and on January 26, 1948, a decision was rendered. Again—as in the case of the Board itself—it was a split decision. Circuit Judges Martin and Allen concurred in the majority opinion, while Circuit Judge Simons filed a vigorous dissent.

In the majority opinion, the Court ruled that

> "We think the logical deduction to be drawn from the opinions of the Supreme Court is that by virtue of the NLRA the obligation of the employer to bargain collectively with representatives of its employees with

> respect to wages, hours and working conditions, includes the duty to bargain with such representatives concerning individual merit wage increases." (R. 132.)

The Court goes on to point out that

> "The refusal of respondent, during the formulation of the 1946 contract, to negotiate with the union concerning merit wage increases and to furnish information upon the subject so that the union could adequately represent the employees, was declared to be the basis of the Board's finding that the respondent had refused to bargain within the meaning of Section 8(5) of the Act."* (R. 130.)

Despite the fact that Ground Two was the sole basis of the finding by the Board, the Court went beyond that and held, as heretofore indicated, *that merit increases had to be bargained with the union, regardless of contractual provisions*, and—apparently—without regard to the *seasonableness* of the demand. In other words, at no time—and regardless of contract provisions—could the company grant merit increases without first bargaining with respect thereto with the union. Thus, in effect, the Court sustains Ground One as well as Ground Two!

The Court frankly conceded that none of the decisions which it cited was directly in point, but felt that all unilateral action in so far as this particular employer was concerned was illegal, and therefore granted the order of enforcement.

Circuit Judge Simons, in his dissent, acknowledged that an employer could not "unilaterally bargain" with respect to wages. However, he pointed out that "merit increases as such are neither the result of negotiation nor contract." He conceded—as has the company—that if

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* As we have previously pointed out, the record does not show a *refusal to furnish information* during the formulation of the 1946 contract, nor does it show a refusal to negotiate concerning merit wage increases.

they were a part of a plan to undermine the union, they would be illegal. He states, however, that

> "In the instant case, there is no finding that the merit increases were in pursuance of such plan, no finding that they did, in fact, undermine the union, no evidence to sustain such findings if they had been made, and the history of labor management relations in the respondent's plant repels any inference that its merit increases had either such purpose or effect." (R. 137.)

In so far as the company's refusal to bargain in the formulation of the 1946 contract was concerned—and it will be remembered that this (Ground Two) was the sole basis for the Board's holding that the company was guilty of an unfair labor practice—the dissenting opinion points out that

> "The law compels bargaining. It does not and may not compel agreement. In the present case, the union sought to bargain upon the subject of merit increases, *but abandoned its demand and freely entered upon an agreement still in effect when the order was made which contained no reference to merit increases or maximum compensation. The union should, as the employer must, stand by its bargain. The Allison Company was not guilty of an unfair labor practice and enforcement should be denied to the Board's order." (R. 138.)

REASONS FOR GRANTING THE PETITION.

The Circuit Court of Appeals for the Sixth Circuit has decided an important question of Federal Law which has not been, but should be, settled by this Court.

1. We insist that since the National Labor Relations Board's decision was based solely on the company's conduct in the formulation of the 1946 contract (Ground Two), the sole question to be decided by the Court *was whether*

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*But only to the extent of the inclusion of the proposed clause!

the Board's conclusion in that particular was proper or not. Instead of confining itself to this question, the Court went far beyond the holding of the National Labor Relations Board, and ruled the company guilty on the basis of Ground One as well as Ground Two! This is clearly *ultra vires* on the part of the Court.

2. The Court and the Board, by ruling Ground Two as sufficient basis for a finding of an unfair labor practice, found the company guilty of something which did not even exist at the time the charge and complaint issued. This is also illegal.

3. If the only question is whether the company was guilty of a refusal to bargain in the formulation of the 1946 contract, the answer must be in the negative, as pointed out so succinctly by Judge Simons. Ground Two is obviously fallacious.

4. Should it be held, however, that the Court has before it the consideration of the broad question of merit increases, and whether a company can grant a merit increase without negotiating it through the union, then we most respectfully urge that, in the absence of a contractual stipulation to the contrary, and in the absence of evidence that the granting of such *ex parte* merit increases is designed to or is resulting in damage to the principle of collective bargaining as between the employer and the union, an employer is fully justified in granting such *ex parte,* non-negotiated increases.

BRIEF.

While we will not do more than touch on the legal reasoning applicable to the four questions involved in this case, we do wish to point out some of the law which leads us to believe that this petitioner was and is justified in asking the Court to refuse to issue an order of enforcement.

Reason One. It has long been an accepted rule of law that the courts, in considering the actions of the National Labor Relations Board, do not have the power to go beyond the ruling of the Board and substitute their own judgment. Beginning with the case of *NLRB vs. Waterman Steamship Corporation*, decided by this Court in 1940 and reported in 309 U. S. 206, it has been held that the finding of facts is a function of the Board, and not of the courts. In this case, as we have heretofore shown, the Board itself pretermitted the question of whether petitioner was guilty of an unfair labor practice in declining to furnish a list of merit increases in May, 1945, during the middle of the contract year. The Board held that it was not necessary for them to pass on this question.*

The Board went on to hold that they based their finding of an unfair labor practice on petitioner's refusal to include a clause in such contract that would give the union bargaining rights as to merit increases, and also upon the company's refusal at that time to furnish information.

The Court of Appeals, however, went beyond this latter holding, which has been termed Ground Two. The Court picked up Ground One as well—*although it had been pretermitted by the Board.*

We submit that this is *ultra vires* on the part of the Court.

A finding that certain primary facts constitute an unfair labor practice, represents what might be called *a finding of ultimate fact.* See *NLRB vs. Columbian Enameling & Stamping Co.*, 306 U. S. 292.

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* Although this was the sole basis of the charge and complaint!

We can find no indication in any authority on administrative legislation and adjudication—and we have made an exhaustive study of the works of Sir Cecil Carr, James Hart, and the excellent survey by Ernst Freund—which would lend any credence to the validity of the action of the Court of Appeals in undertaking to animate the lifeless corpse of Ground One, which was so effectively slain by the deliberate neglect of the National Labor Relations Board.

We submit that the Circuit Court of Appeals erred in undertaking to find that petitioner was guilty of an unfair labor practice on the basis of Ground One.

Reason Two. The finding of the Labor Board and of the Court that this petitioner was guilty of an unfair labor practice on the basis of facts which occurred not only after the filing of the charge, *but after the issuance of the complaint in this case*, was *ultra vires* and unlawful.

This case originated with the filing of a charge by the union. This charge was based on the fact that in the middle of a contract year the company refused to give the union a list of merit wage increases which the company had made. *The furnishing of this list was the sole question involved.*

Mr. Allen, the International representative of the union, testified that after the company had declined to furnish this list, the union "agreed that we would ask the Board to determine whether or not we should have that information." (R. 57)

The furnishing of this information was the sole issue between the parties.

That this is true is plainly indicated by the statement of a Mr. Brin, who came to see the company on behalf of the Labor Board after the filing of the charge. He stated—and his statement appears on pages 59 and 60 of the record in this cause:

"Because you see this charge is that you didn't give them the names or rates of persons within the Union whose wages had been raised. That's the basis for this charge, that the Company kept away from the Union, by refusing to give to it information regarding the wage rates of its own members. That's the whole basis of this charge, and they claim that that is a failure to bargain."

The trial examiner stated in response to a question as to the perimeter of the hearing, that "the only issue here before us is the issue described in the Complaint issued by the Board, and that would be the only issue that the Board would make any findings on." (R. 60)

Petitioner thereupon concluded that the issue before the Board was that of whether the company should furnish the list that had been requested.

But the Board completely abandoned this issue, and based its finding of a refusal to bargain "upon the respondent's failure during the formulation of the 1946 contract to negotiate concerning wage increases * * * and upon respondent's continuing refusal to furnish to the union information concerning merit increases * * *."

All of these alleged facts occurred after the issuance of the complaint in the case, and while they can be loosely said to come within the scope of the charge, they are radically different from the basis of the charge and from the concept of the case as indicated by the pleadings and statements by the agent of the Board. There was not that degree of reasonable certainty in the notice provided by the pleadings that is called for by our idea of American justice, and we submit that for this reason the Board and Court were in error in their finding of an unfair labor practice based on these facts.

Reason Three. Our third reason is tongued and grooved into our second, and serves to complement it. The alleged facts of Ground Two—which we have asked this

Court to rule out on account of the technicality suggested in our second reason—should also be ruled out because, even had they been properly plead, *there is no factual basis to sustain them.*

As Judge Simons stated in his dissent, "The law compels bargaining. It does not and may not compel agreement." Surely this company cannot be held to have refused to bargain when, *after one request* by the union that this clause be included, and upon the company's statement that it did not wish to include such a clause, the union withdrew its demand and proceeded to execute the contract.

There is no evidence whatever that during the negotiation of the contract the union requested the list that formed the original basis for the filing of the charge. We have repeatedly conceded that such a request would have been reasonable, timely, and proper, and that the company would have been obligated to furnish the information at that time. *But it was not requested.*

We submit that there is no factual evidence on which Ground Two can be sustained as a basis for a finding of an unfair labor practice.

Reason Four. Our fourth reason is that even if the broad question of merit increases as such is to be considered, without reference to the technical questions existing in the case, the Circuit Court of Appeals must be reversed.

We concede, of course, that an employer may not unilaterally bargain with respect to wages.

Not one of these decisions cited by the Circuit Court of Appeals, however, holds or indicates that merit increases may not be granted within the existing wage structure.

The company and the union had a contract which established only minimum wage rates. In other words, the company's contractual liability for wages was met so long

as it paid a minimum wage that had been agreed upon with the union.

Employees, who were already making the minimum, received increases in one of two ways. They either negotiated such increases, through the medium of the union—or, in some instances, the company would give the individuals an *ex parte* and unilateral increase on the basis of good performance, such increases being known as merit increases.

It is the theory of the Board and of the Circuit Court of Appeals that the latter of these two methods of increases is illegal. It is your petitioner's insistence that such a method of increase is not illegal under the existing contract.

We concede that any employee is entitled to bargain, through the union, for the first type of increase which we mentioned,—which we call a "negotiated increase." But we insist that so long as we meet our contractual obligation of paying the minimum wage established by the contract, and by negotiating as to such increases as the union may bring up, we are perfectly free to grant unilateral increases to employees without bargaining negotiation, unless it be made to appear that such is for the purpose or has the effect of undermining or damaging the union, and, as Judge Simons points out in his dissent, there is no proof whatsoever that such is true in this case.

We also concede that the company is obligated to furnish such a list as constituted the basis of the charge in this case at any time when wages are being bargained. Had such a list been demanded when the 1946 contract was being formulated, the company would have been obligated to furnish it. But it was not demanded.

The very decisions cited by the Circuit Court of Appeals show that, although collective bargaining requires an employer to bargain collectively and not individually with his employees, there are still areas untouched by the collectivism—areas in which the employer may deal with his

employee as an individual. We insist that this very clear language of this Honorable Court is plainly intended to cover just such situations as this.

Suppose, for example, that an employer was in the habit of giving certain of his employees a turkey at Christmas time, in recognition of their outstanding service. Suppose that he chose the employees who were to be the recipients of such a gift on a purely unilateral basis. So long as that employer had not contracted away his right to make such gifts, he would be perfectly within his rights in making them. There would be no element of bargaining involved—no negotiation. The employees involved did not know that they were the recipients until they actually received the gift.

We quickly concede that the union could request the company to make this matter a subject of collective bargaining, by including it in the contract. If that were agreeable to the employer and it was included in the contract, then it would indeed be a proper subject of collective bargaining. But if the employer demurred to putting that into the contract, and if the union then withdrew its demand for such a contractual provision—the employer would still be entitled to make these gifts unilaterally, as in the past.

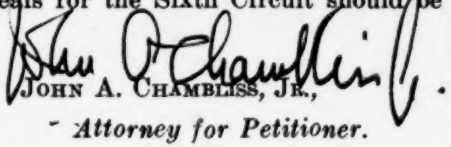
That is exactly what was done in this case.

Of course merit increases can be made the subject of collective bargaining. In many contracts it is stipulated that no merit increases will be awarded without prior consultation with the union. But that is because of the contractual provision, rather than the general law of the land. We earnestly contend that since all contractual and lawful obligations as to bargaining have been met by the petitioner, there was no failure to bargain. The granting of merit increases unilaterally did not constitute a refusal to bargain—(and it is significant that the Labor Board did not hold that it was, nor did the Circuit Court of Ap-

peals, other than by implication!). The refusal to furnish the list, on account of which the original charge was filed, was not a refusal to bargain, coming as it did in the midst of the contract year.

The decision of the Circuit Court of Appeals should be reversed, and the order of enforcement disallowed.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit should be granted.



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